

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

Chad Evans,  
Petitioner

v.

No. 1:08-cv-105-JD

Warden,  
New Hampshire State Prison,  
Respondent

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION  
TO MOTION FOR SUMMARY JUDGMENT  
AND CROSS-MOTION FOR SUMMARY JUDGMENT

On February 19, 2010, the Warden filed a Motion for Summary Judgment ("MSJ") on Evans's Petition for Writ of Habeas Corpus Under 28 U.S.C. §2254 ("Petit."), and an accompanying Memorandum of Law. Evans has filed an Objection to the Warden's Motion, as well as a Cross-Motion for Summary Judgment. He files this Memorandum in support of both his Objection and Cross-Motion. Based on the Petition, which Evans incorporates by reference, and the additional arguments in his Memorandum, Evans is entitled to summary judgment on the pleadings.

Background

Chad Evans was charged in state court with second degree murder, five counts of second degree assault, simple assault, and endangering the welfare of a child. Petition

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of Evans, 154 N.H. 142, 144, 908 A.2d 796, 798 (2006),  
cert. denied, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1888, 167 L.Ed.2d 274  
(2007). On December 21, 2001, after ten days of trial and  
three days of deliberation, the jury convicted Evans of all  
charges. Id. On April 16, 2002, the trial court (Nadeau,  
J.) sentenced Evans to serve 28 years to life in prison on  
the murder charge, and concurrent sentences on the other  
charges. Id.

Eleven days after Evans was convicted, N.H. R.S.A.  
651:58, I ("RSA 651:58, I") went into effect. Id. This  
statute gave the State the opportunity to appeal a state  
prison sentence to the Sentence Review Division of the  
Superior Court - an option formerly held only by the  
sentenced inmate. Petition of the State of New Hampshire  
(Sentence Review Division), 150 N.H. 296, 297, 837 A.2d 291,  
292 (2003). The State exercised its statutory right to  
appeal Evans's sentence. Id. The Sentence Review Division  
kept in tact the murder sentence of 28 years to life, but  
imposed three consecutive 5-15 year sentences on three  
second degree assault convictions. Petition of Evans, 154  
N.H. at 144, 908 A.2d at 799. This increased Evans's  
minimum term of imprisonment from 28 to 43 years.

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Evans challenged the Division's ability to increase his sentence in the New Hampshire Supreme Court, alleging, in pertinent part, that RSA 651:58, I was ex post facto as applied to his case. Id. That court rejected his claim. Id. The United States Supreme Court subsequently denied his petition for writ of certiorari. Evans v. New Hampshire, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1888, 167 L.Ed.2d 274 (2007). Evans then filed this Petition, which this Court stayed based on his request to develop and exhaust other state court claims. See Order of May 6, 2008. On January 12, 2010, the Court lifted the stay and Evans reinitiated his Petition. See Order of January 20, 2010; Petition (re-served on January 20, 2010).

Pending are the Petition, the Warden's Motion for Summary Judgment, Evans's Objection and his Cross-Motion for Summary Judgment. Evans agrees with the Warden that no evidentiary hearing is needed to resolve these motions. Based on the facts and the law, the application of RSA 651:58, I to Evans violates the federal constitutional prohibition against ex post facto laws. U.S. Const. Art. I, §10. This Court should grant his Petition and order the Sentence Review Division to reinstate his sentence of 28 years to life in prison.

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Response to Warden's Arguments

The Warden argues that RSA 651:58, I is not an ex post facto law as applied to Evans. MSJ 10-12. He argues alternatively that the state court's application of the ex post facto clause was neither contrary to, nor an unreasonable application of, federal law. MSJ 12-15. The Warden contends that the Clause's reach is nearly exclusively limited to crimes or penalties that were not in effect when the defendant committed his crime. MSJ 10-11. This reading ignores Supreme Court precedent holding that a law violates the ex post facto clause when it "creat[es] a significant risk of increas[ed] . . . punishment." Garner v. Jones, 529 U.S. 244, 255, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000).

In addition to the Third, Seventh and Eighth Circuit cases Evans cited in his Petition, Petit. 7-8, the Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have engaged in the "significant risk of increased punishment" analysis of ex post facto claims. See, e.g., Wallace v. Quarterman, 516 F.3d 351, 355 (5<sup>th</sup> Cir. 2008) (applying "significant risk" analysis to change in parole regulations); Michael v. Ghee, 498 F.3d 372, 382 (6<sup>th</sup> Cir.

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2007) (focus is "whether the new guidelines present a significant risk of increasing the plaintiff's amount of time actually served"); Fletcher v. Reilly, 433 F.3d 867, 876-77 (D.C. Cir. 2006) ("The controlling inquiry under Garner is . . . whether differences in the exercise of discretion between the two systems actually create[ ] a significant risk of prolonging [an inmate's] incarceration.") (quotation omitted) (brackets added by Fletcher Court); Swan v. Ray, 293 F.3d 1252, 1253-54 (11<sup>th</sup> Cir. 2002) (discussing Garner); Henderson v. Scott, 260 F.3d 1213, 1216 (10<sup>th</sup> Cir. 2001) (new law must create sufficient risk of increasing punishment).

The First Circuit, in a case cited by the Warden, MSJ 12, has also applied the "significant risk of increased punishment" test to ex post facto claims. Hamm v. Latessa, 72 F.3d 947 (1<sup>st</sup> Cir. 1995). In Hamm, an inmate pursued an ex post facto claim based on a change in the parole scheme. Id. at 957-958. The court rejected the claim based on the inmate's inability to demonstrate a significant likelihood of harm, in the form of increased incarceration, based on the change in the scheme. Id. (relying on California Department of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)).

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The Warden argues that RSA 651:58, I "did not increase the maximum sentence, nor did it assure that, if the State requested a lengthier sentence, the request would be fulfilled." MSJ 12. These statements are accurate. However, if "significant risk of increased punishment" is the appropriate test, RSA 651:58, I is ex post facto as applied to Evans. Before that law was enacted, an offender in Evans's position had no risk of increased punishment, after having been sentenced by the trial court, unless he initiated review of his sentence by the Sentence Review Division. After the law was enacted, the State could initiate sentence review irrespective of the offender's intent or desire, and request that the Sentence Review Division increase the term of incarceration the trial judge had imposed.

Moreover, unlike in Hamm or Morales, the risk of increased punishment here is not speculative. When the government appeals a sentence, the risk that the sentence will be changed to the detriment of the defendant is great. See Amy Baron Evans and Jennifer Niles Coffin, *Deconstructing the Relevant Conduct Guideline: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing* 32 n. 38 (August 11, 2008), available at

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[http://www.fd.org/pdf\\_lib/relevant\\_conduct3.pdf](http://www.fd.org/pdf_lib/relevant_conduct3.pdf) ("A study of appellate decisions after Booker shows that 98.6% of within-guideline sentences appealed by defendants were affirmed, and 78.3% of below-guideline sentences appealed by the government were reversed."). The fact that RSA 651:58, I gave the State the ability to seek a sentence increase, but did not compel the Sentence Review Division to adopt the State's recommendation, does not deprive the law of its ex post facto character. See Michael, 498 F.3d at 382 ("The presence of discretion does not displace the protections of the Ex Post Facto clause. . . ."); Fletcher, 433 F.3d at 876-77 (regulation that changes how board exercises discretion may still be ex post facto as applied); cf. United States v. Demaree, 459 F.3d 791, 792-94 (7<sup>th</sup> Cir. 2006) (change in advisory sentencing guideline not ex post facto).

The Warden further argues that the state court's ruling is neither contrary to, nor an unreasonable application of, federal law. MSJ 12-15. Evans has two responses. First, because the state court misconstrued the scope of the protection afforded by the ex post facto clause, and therefore failed to properly apply the "significant risk of

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increased punishment" test, its decision was both contrary to and an unreasonable application of federal law.

Second, Supreme Court precedent, while not "materially indistinguishable" on its facts, nonetheless illustrates the ex post facto nature of RSA 651:58, I as applied to Evans such that the state court's failure to apply that precedent, and afford Evans relief, was unreasonable. The "reasonable" interpretation of that precedent is that new laws retrospectively exposing an offender to increased punishment are ex post facto. Petit. at 7-8 (citing and quoting cases). RSA 651:58, I, as applied to Evans, had that effect. This Court should grant Evans's petition.

WHEREFORE, Mr. Evans respectfully requests that this Honorable Court:

- a. Deny the Warden's Motion for Summary Judgment;
- b. Grant Evans's Cross-Motion for Summary Judgment;

and

- c. Remand his case to the Sentence Review Division of the Superior Court with an order to reinstate his sentence of 28 years to life in prison.

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Respectfully submitted,

/s/ David M. Rothstein

By

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been emailed this 17th day of March, 2010, to:

Elizabeth C. Woodcock  
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/s/ David M. Rothstein  
David M. Rothstein

DATED: March 17, 2010